# *Cooper Industries v. Aviall Services*: Destroying the Incentive for Negotiated Settlements and Undermining the Increased Use of Alternative Dispute Resolution Under the Comprehensive Environmental Response, Compensation, and Liability Act

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## I. INTRODUCTION

The United States Supreme Court's decision in *Cooper Industries, Inc. v. Aviall Services, Inc.*,[1] which limits Potentially Responsible Parties' (PRPs)[2] ability to obtain contribution from other PRPs, undermines the United States Environmental Protection Agency's (EPA) goal of encouraging the use of alternative dispute resolution (ADR) to reach negotiated settlements.[3] The

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[1] Cooper Indus., Inc. v. Aviall Services, Inc., 543 U.S. 157 (2004).

[2] "Potentially Responsible Party or PRP means any person who may be liable pursuant to § 107(a) of CERCLA, 42 U.S.C. § 9607(a), for response costs incurred and to be incurred by the United States not inconsistent with [the National Contingency Plan NCP)]." 40 C.F.R. § 304.12(m) (2002). The National Contingency Plan provides procedures for CERCLA site investigation, evaluation, remediation, and documentation. Stanley A. Millan, *Contemporary CERCLA: Reversals of Fortune and Black Holes*, 16 FORDHAM ENVTL. L. REV. 183, 185 (2005). "The [National Contingency Plan] applies to both private clean-ups as well as the EPA clean-ups." *Id.*

[3] *See* Alternative Dispute Resolution at EPA, http://www.epa.gov/adr/cprc_adratepa.html (last visited Mar. 12, 2007). The website states:

> [The] EPA encourages the use of ADR techniques to prevent and resolve disputes with external parties (e.g., state agencies, industry, environmental advocacy groups) in many contexts, including adjudications, rulemaking, policy development, administrative and civil judicial enforcement actions, permit issuance, protests of contract awards, administration of contracts and grants, stakeholder involvement, negotiations, and litigation.

use of ADR and negotiated settlements by the EPA is essential for resolving conflicts involving the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[4]

The EPA and the Council of Environmental Quality (CEQ)[5] continue to "strongly support" the use of ADR and negotiated settlements in order to resolve conflicts under CERCLA.[6] The EPA policy on ADR points to the numerous benefits of ADR, including faster resolution of issues; more creative, satisfying, and enduring solutions; reduced transaction costs; fostering a culture of respect and trust among the EPA, its stakeholders, and its employees; improved working relationships; increased likelihood of compliance with environmental laws and regulations; broader stakeholder support for agency programs; and better environmental outcomes.[7] In fact, a recent joint statement by the CEQ and the Office of Management and Budget (OMB) stated that agencies adopting Environmental Conflict Resolution (ECR) and ADR mechanisms and strategies "have reported progress on

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*Id.*

[4] *See* Jon Niermann, *Alternative Dispute Resolution in CERCLA Settlement*, 17 J. ENVTL. L. & LITIG. 389, 389 (2002) (stating that "[ADR] is an indispensable, if imperfect, component of the federal government's efforts to address the threats posed to human health and the environment by the nation's hazardous waste sites"); *see also* Mary C. Wood, *The Tribal Property Right to Wildlife Capital (Part II): Asserting a Sovereign Servitude to Protect Habitat of Imperiled Species*, 25 VT. L. REV. 355, 425 n.339 (2001). "The use of [ADR] is gaining ground in resolving environmental conflicts and has spawned a distinct field of Environmental Conflict Resolution (ECR)." *Id.*

[5] A recent joint memorandum from the Center of Environmental Quality and the Office of Management and Budget reinforced the Executive's commitment to Environmental Conflict Resolution and ADR. OFFICE OF MGMT. & BUDGET AND PRESIDENT'S COUNCIL ON ENVTL. QUALITY, MEMORANDUM ON ENVIRONMENTAL CONFLICT RESOLUTION [hereinafter MEMORANDUM ON ENVIRONMENTAL CONFLICT RESOLUTION] (2005), http://www.ecr.gov/pdf/OMB_CEQ_Joint_Statement.pdf. Through the use of ADR, federal agencies handling environmental conflicts are able to improve negotiated outcomes and the implementation of agreements. *Id.* Additionally, "ADR helps make the government more results-oriented, citizen-centered and provides for effective public participation in government decisions, encourages respect for affected parties and nurtures good relationships for the future." *Id.*

[6] *See id.*; Environmental Protection Agency Policy on Alternative Dispute Resolution, 65 Fed. Reg. 81,858 (Dec. 27, 2000), *available at* http://www.epa.gov/adr/epaadrpolicyfinal.pdf (stating that "[t]he [EPA] strongly supports the use of alternative dispute resolution (ADR) to deal with disputes and potential conflicts").

[7] *Id.* at 81,858–59 (finding that ADR creates a more efficient workplace and increases cooperation with State and local governments, PRPs, public interest groups, and the public).

improving negotiated outcomes and the implementation of agreements."[8] The CEQ and OMB joint statement called for the creation of incentives to increase the use of ADR and "[d]ocumenting other useful forms of ADR such as un-assisted principled negotiation."[9]

However, the Supreme Court's decision in *Cooper v. Aviall* undermines the EPA's policy of promoting the use of ADR and reaching negotiated settlements between PRPs and the EPA or other PRPs.[10] PRPs may now only obtain contribution under certain circumstances. A PRP may seek contribution if it has been sued under § 106[11] or § 107(a)[12] of CERCLA, or if

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[8] MEMORANDUM ON ENVIRONMENTAL CONFLICT RESOLUTION, *supra* note 5. The statement further directs agencies "to increase the effective use of [ECR] and build institutional capacity for collaborative problem solving." *Id.* Some examples of mechanisms and strategies include, but are not limited to, "[s]etting performance goals for increasing use of ECR; explore why goals may not be met and what steps are necessary to meet them in the future," "[t]racking annual costs of environmental conflict to the agency and setting goals for reduction in such costs," "[i]dentifying annual resource savings and benefits accrued from collaborative solutions," "[d]rawing on agency dispute resolution specialist and existing agency ADR resources pursuant to the Alternative Dispute Resolution Act of 1998," "[b]uilding expert knowledge, skills, and capacity by strengthening intellectual and technical expertise in ECR and [ADR]," "supporting early assessment and assistance for ECR and [ADR] so that subsequent savings can occur through improved outcomes and reduced administrative appeals and litigation." *Id.*

[9] *Id.*

[10] *See* Perry A. Craft & Michael G. Sheppard, *What the U.S. Supreme Court's 2004–2005 Decisions Mean to Tennessee Lawyers*, 41 TENN. B. J. 16, 18 (Sept. 2005) (stating that *Cooper v. Aviall* will discourage PRPs from entering into settlements without litigation, and that the PRP's counsel may demand the PRP to wait for litigation "to preserve their rights to contribution").

[11] CERCLA § 106 involves the issuance of administrative orders by the President in order to protect the public health and welfare. *See* 42 U.S.C. § 9606 (2000).

[12] CERCLA § 107(a) states:

> (a) Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—
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> (1) the owner or operator of a vessel or a facility,
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> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
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> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

the PRP has completely resolved its liability through either an administratively or judicially approved settlement.[13] The Supreme Court's decision in *Cooper v. Aviall* encourages PRPs to wait for litigation instead of voluntarily incurring cleanup costs or negotiating settlements with administrative agencies.[14]

This Note will discuss the impact of *Cooper v. Aviall* on negotiated settlements and a possible solution to the problems created by the Supreme Court's decision. Part II discusses the role of ADR and negotiated settlements under CERCLA.[15] Part III analyzes the Supreme Court's decision in *Cooper v. Aviall.*[16] Part IV discusses the effects of *Cooper v. Aviall* on the incentive for PRPs to negotiate settlements with the EPA or state administrative agencies.[17] Part V discusses why Congress should amend CERCLA to allow PRPs incurring voluntary cleanup costs to obtain contribution from other PRPs and why the continued use of ADR under CERCLA is essential.[18]

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> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—
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> (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;
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> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;
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> (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and
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> (D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

42 U.S.C. § 9607(a) (2000).

[13] *Cooper v. Aviall*, 543 U.S. at 167.

[14] *See* Millan, *supra* note 2, at 214. "One aftermath of [*Cooper v. Aviall*] is increased litigation over the nature of any implied contribution actions under Section 9607 or other causes of action under federal environmental laws (i.e. Resource Conservation Recovery Act) or state mini-CERCLAs." *Id.*

[15] *See infra* Part II.

[16] *See infra* Part III; *see also* Millan, *supra* note 2, at 213–14.

[17] *See infra* Part IV.

[18] *See infra* Part V.

## II. NEGOTIATED SETTLEMENTS AND ADR UNDER CERCLA

ADR techniques have been critical for the EPA in settling conflicts involving environmental liability.[19] Using ADR to resolve conflicts over environmental issues results in the opening of lines of communication between the EPA and PRPs.[20] Increasing the use of ADR in resolving environmental issues may lead to more efficient and beneficial resolutions for improving the public health and welfare.[21] Section A of this Part will describe the background of negotiated settlements under CERCLA.[22] Section B will discuss some additional ADR techniques—outside of principle party negotiation—used by the EPA to facilitate negotiated settlements between PRPs and the EPA.[23]

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[19] *See* Niermann, *supra* note 4, at 390–91.

> The [EPA] identified a particularly valuable role for ADR under CERCLA. The EPA believed that it could more quickly accomplish CERCLA's objective of cleaning up the nation's hazardous waste sites by enlisting responsible parties to cooperate in the cleanup effort. This was accomplished by seeking negotiated settlements with the [PRPs] instead of employing the more traditional tools of reimbursement actions, court orders, and administrative orders expressly provided in CERCLA.

*Id.*; *see also* Shana A. Samson, Notes & Comments, *Using Alternative Dispute Resolution to Streamline Superfund*, 15 OHIO ST. J. ON DISP. RESOL. 519, 529 (2000) (arguing that ADR can be extremely effective under CERCLA because PRPs are subject to strict liability and generally have little incentive to litigate).

[20] *See* Environmental Protection Agency Policy on Alternative Dispute Resolution, 65 Fed. Reg. 81,858–59.

[21] *See* Niermann, *supra* note 4, at 413–14.

> The ADR tools of CERCLA's settlement procedures are indispensable in promoting timely and cost-effective settlement and remediation, especially in light of the failure of litigation. For most cost-recovery and contribution actions, litigation has proven to be a wholly inadequate approach. CERCLA litigation frequently generates disproportionate transaction costs . . . [and] [m]oreover, litigation tends to delay response.

*Id.*

[22] *See infra* Part II.A.

[23] *See infra* Part II.B.

### A. *Background of Negotiated Settlements Under CERCLA*

Congress first enacted CERCLA in 1980.[24] CERCLA's primary goal is to remediate hazardous waste sites and to hold PRPs liable for remediation costs.[25] When Congress amended CERCLA in 1986 with the Superfund Amendments and Reauthorization Act (SARA),[26] it added provisions which were meant to streamline settlements[27] and allow PRPs to more easily obtain contribution from other PRPs.[28] Congress used the amendments in SARA to strongly encourage the use of negotiated settlements under CERCLA.[29] Because CERCLA is a strict liability regime, many PRPs choose to bypass the litigation process, admit responsibility, and voluntarily enter into negotiations culminating in a consent decree with the EPA.[30] When PRPs voluntarily choose to enter into settlement negotiations, it may drastically decrease litigation costs and increase efficiency in resolving disputes over environmentally impacted sites.[31] The provisions of § 122 also provide incentives for PRPs to negotiate a settlement.[32] The most important incentive

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[24] Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601–9675 (2000). The cited statute is commonly referred to as CERCLA or as Superfund.

[25] *See* Niermann, *supra* note 4, at 394.

[26] Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99–499, 100 Stat. 1613 (1986) (codified in scattered sections of 42 U.S.C.).

[27] *See* 42 U.S.C. § 9622 (2000); *see also* Samson, *supra* note 19, at 521 (stating that "CERCLA was amended by [SARA] in 1986 to provide a variety of improvements, including the encouragement of negotiated settlement. CERCLA, as amended by SARA, includes many opportunities for ADR to expedite settlement while reducing transaction costs.").

[28] *See* 42 U.S.C. § 9613(f) (2000).

[29] *See* Samson, *supra* note 19, at 521.

[30] *See* 6 FRANK P. GRAD, TREATISE ON ENVIRONMENTAL LAW § 15.03 (Matthew Bender & Company, Inc. 2004); *see also* Kenneth K. Kilbert, *Successor Liability Under CERCLA: Whither Substantial Continuity*, 14 PENN ST. ENVTL. L. REV. 1, 3 (2005). PRPs will be held strictly liable, regardless of fault, for the "costs incurred in response to releases of hazardous substances" under CERCLA. Kilbert, *supra*, at 3.

[31] *See* Samson, *supra* note 19, at 521 (establishing that "CERCLA, as amended by SARA, includes many opportunities for ADR to expedite settlement while reducing transaction costs").

[32] Niermann, *supra* note 4, at 397. These incentives include a covenant not to sue and control over site investigation and remediation. *Id.*

for the PRP is the covenant not to sue, which prevents the PRP from being held additionally liable at the specific environmentally impacted site.[33]

When the EPA begins an enforcement action under CERCLA, its goal is to reach a voluntary settlement with each PRP.[34] The EPA issues a PRP letter to suspected PRPs informing them of potential liability for the cleanup of an environmentally impacted property.[35] The letter also calls for the PRP to enter into informal negotiations.[36] The PRP is then faced with three choices: (1) enter into negotiations to reach a voluntary settlement; (2) force the government to order cleanup; or (3) have the government clean up the site and face litigation for reimbursement costs.[37]

In the past, entering into voluntary negotiated settlements was an effective approach for PRPs in CERCLA's strict liability regime.[38] Voluntarily entering into settlement negotiations provides numerous advantages to PRPs.[39] First, PRPs may obtain immunity from contribution

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[33] *Id.* The covenant not to sue "protect[s] settling parties from government actions for additional relief, and contribution protection, which protect settling parties from contribution actions by other PRPs." *Id.*; *see also* 42 U.S.C. §§ 9622(f), (g)(2) (2000); 42 U.S.C. § 9613(f)(2) (2000); 42 U.S.C. § 9622(h)(4) (2000).

[34] Superfund Program; Notice Letters, Negotiations and Information Exchange, 53 Fed. Reg. 5298 (Feb. 23, 1988) (stating that "[a] fundamental goal of the CERCLA enforcement program is to facilitate voluntary settlements"); *see also* Samson, *supra* note 19, at 523. "Whenever possible, the EPA will attempt to reach a negotiated settlement with PRPs, through which the PRPs will conduct or finance response actions. CERCLA provides the EPA with a number of provisions to encourage settlements." Samson, *supra* note 19, at 523.

[35] Superfund Program; Notice Letters, Negotiations and Information Exchange, 53 Fed. Reg. 5300 (Feb. 23, 1988); *see, e.g.*, Stamford Wallpaper Co., Inc. v. TIG Ins., 138 F.3d 75, 78 (2d Cir. 1998) (discussing the background of EPA's PRP letter process); Anderson Dev. Co. v. Travelers Indem. Co., 49 F.3d 1128, 1130 (6th Cir. 1995) (describing a PRP letter's general contents).

[36] Superfund Program; Notice Letters, Negotiations and Information Exchange, 53 Fed. Reg. 5300.

[37] *See* R.T. Vanderbilt Co., Inc. v. Cont'l Cas. Co., 870 A.2d 1048, 1056 (Conn. 2005); *see also* Mark S. Dennison, Annotation, *What Constitutes "Suit Triggering" Insurer's Duty to Defend Environmental Claims—State Cases*, 48 A.L.R. 5th 355, 367 (1997).

[38] *See* Michael P. Vandenbergh, *The Private Life of Public Law*, 105 COLUM. L. REV. 2029, 2089 (2005). "[T]he Supreme Court's recent narrow interpretation of CERCLA section 113(f) in [*Cooper v. Aviall*] demonstrates a particular lack of concern for the role of private bargaining and private incentives in environmental law." *Id.*

[39] *See* 42 U.S.C. § 9613(f)(2) (2000). Section 9613(f)(2) states:

actions from other PRPs.[40] Second, PRPs may receive concessions with respect to past environmental cleanup costs.[41] Third, PRPs can lower remediation costs by beginning to remediate at an earlier stage in the spread of contamination.[42] Fourth, the EPA may allow the PRP to pursue alternative and less costly remediation methods.[43] Fifth, the PRP can exert some control over the administrative record.[44] Finally, the PRP may obtain a covenant not to sue from the EPA.[45] If the EPA does not reach a negotiated settlement with the PRP, then the EPA may either issue an administrative order[46] or the EPA may choose to perform the cleanup at the site and file a cost recovery action against the PRP.[47] Thus, if the EPA and PRP do not negotiate a

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> Settlement. A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

42 U.S.C. § 9613(f)(2).

[40] *Id.*; *see R.T. Vanderbilt Co.*, 870 A.2d at 1056–57.

[41] *See R.T. Vanderbilt Co.*, 870 A.2d at 1056 (citing C. SWITZER & L. BULAN, CERCLA: COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT (SUPERFUND) § 11.1.4 (2002)).

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *See* 42 U.S.C. § 9606 (2000). Section 9606(a) states:

> In addition to any other action taken by a State or local government, when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities of the case may require. The President may also, after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment.

42 U.S.C. § 9606(a).

[47] *See* 42 U.S.C. § 9607(a)(4)(B) (2000).

settlement, both the EPA and PRP will likely face litigation.[48] In order to promote efficiency in remediating contaminated properties and to keep litigation costs down, the EPA must continue to encourage voluntary negotiated settlements with PRPs.

### B. *ADR Techniques Employed by the EPA to Help Reach Negotiated Settlements Under CERCLA*

The EPA employs a number of ADR techniques in order to assist PRPs and the EPA in reaching a negotiated settlement under CERCLA.[49] The EPA finds that the use of ADR techniques leads to quicker and more efficient cleanups of contaminated sites because of the increased cooperation of PRPs in participating with the cleanup of hazardous waste sites.[50] In defining ADR, the EPA adopted the definition used by the Administrative Dispute Resolution Act of 1996, stating that ADR is "any procedure that is used to resolve issues in controversy, including, but not limited to, conciliation, facilitation, mediation, fact-finding, minitrials, arbitration, and use of ombuds, or any combination thereof."[51] The EPA promotes the use of ADR techniques in many situations involving PRPs, including adjudications, administrative and civil judicial enforcement actions, permit issuance, negotiations, and litigation.[52]

Congress granted the EPA the ability to use both arbitration and mediation within the settlement provisions added to CERCLA by SARA.[53] The principal ADR technique used by the EPA is mediation.[54] In mediating a dispute under CERCLA, a neutral third party mediator promotes a "voluntary

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[48] In fact, after the Court's decision in *Cooper v. Aviall*, it is likely that attorneys will advise clients to wait for litigation in order to save the PRPs contribution rights. Craft & Sheppard, *supra* note 10, at 18.

[49] *See* Niermann, *supra* note 4, at 389. "Since its enactment in 1980 [CERCLA] has served as a laboratory for various ADR methods as regulators and [PRPs] have searched for the most effective means to assess and remediate these hazards." *Id.*

[50] *Id.* at 390–91.

[51] 5 U.S.C. § 571(3) (2000); *see also* Environmental Protection Agency Policy on Alternative Dispute Resolution, 65 Fed. Reg. 81,859 (Dec. 27, 2000).

[52] Environmental Protection Agency Policy on Alternative Dispute Resolution, 65 Fed. Reg. 81,859.

[53] Niermann, *supra* note 4, at 396; 42 U.S.C. § 9622 (2000). The discussion in this Note focuses more on the mediation of disputes under CERCLA because the EPA regulations for arbitration generally apply to cost recovery claims for less than $500,000, which most often only allow *de minimis* PRPs to arbitrate a dispute.

[54] Samson, *supra* note 19, at 527.

negotiated settlement" between the EPA and a PRP or between two opposing PRPs.[55] The mediation of environmental disputes is often successful in aiding negotiations that otherwise would be time consuming and costly.[56] However, if the parties do not have the incentive or are unwilling to negotiate, then mediation and other ADR techniques will be of little use to the parties.[57]

Many ADR techniques used by the EPA have proven effective in resolving disputes under CERCLA.[58] ADR assists parties to resolve CERCLA disputes, which greatly decreases the potentially large transaction costs of environmental litigation.[59] The injection of a mediator, or some other form of a neutral third party, into environmental disputes assists the parties in overcoming any obstacles in negotiating a settlement.[60] The numerous benefits of ADR in helping parties to reach negotiated settlements make it essential that all the incentives for ADR remain in place for parties involved in environmental disputes.

## III. CERCLA CONTRIBUTION AND THE SUPREME COURT'S DECISION IN *COOPER V. AVIALL*

Since CERCLA's enactment in 1980 a substantial amount of legal challenges to CERCLA's provisions have been litigated, with many cases reaching the Supreme Court.[61] Unfortunately, Congress left the courts little

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[55] *Id.* at 527–28.

[56] *Id.* at 528.

[57] *See id.* at 528.

[58] *Id.* at 529. There are numerous reasons for the success of ADR under CERCLA. *Id.* First, the strict liability standard drastically decreases the incentive to litigate. *Id.* Second, because most CERCLA disputes involve complex issues, a third party neutral with expertise in the field can provide superior representation to a judge with relatively little experience with CERCLA claims. *See id.* Additionally, the mediator, or third party neutral, can "facilitate the sharing of information" between parties. *Id.* at 529–30. Finally, the expertise of the mediator or third party neutral helps craft solutions that effectively address the complex issues involved with CERCLA disputes. *Id.* at 530.

[59] *Id.* at 530.

[60] Samson, *supra* note 19, at 530–31. Ms. Samson provides a detailed discussion of ADR under CERCLA. *See id.* at 528.

[61] Michael V. Hernandez, *Cost Recovery or Contribution?: Resolving the Controversy Over CERCLA Claims Brought by Potentially Responsible Parties*, 21 HARV. ENVTL. L. REV. 83, 83 (1997). The following is a lengthy, but non-exhaustive list of United States Supreme Court decisions involving CERCLA. *See generally* Cooper Indus., Inc. v. Aviall Services, Inc., 543 U.S. 157 (2004) (limiting PRPs ability to obtain

legislative history involving CERCLA's provisions, and did not make the necessary effort to draft a clear statute.[62] Most of the questions reaching the Supreme Court involve issues arising from the unclear and conflicting language.[63] In one of its most recent opinions involving CERCLA, the Supreme Court addressed the issue of whether parties who voluntarily incur cleanup costs at contaminated sites can obtain contribution from other PRPs.[64] This Part first discusses CERCLA contribution before *Cooper v. Aviall* in Section A.[65] Section B examines the Supreme Court's decision in *Cooper v. Aviall*,[66] and Section C evaluates whether parties can obtain contribution under § 107(a)(4)(B) after *Cooper v. Aviall*.[67]

## A. *CERCLA Contribution Before* Cooper v. Aviall

Following CERCLA's enactment in 1980, PRPs began to litigate the issue of whether, in addition to the government, a PRP incurring response costs could recover those costs from other PRPs.[68] In particular, the litigation involved whether PRPs who voluntarily incurred response costs and were not

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contribution from other PRPs); United States v. Bestfoods, 524 U.S. 51 (1998) (holding that parent companies can be held responsible under CERCLA for their subsidiary's actions); Key Tronic Corp. v. United States, 511 U.S. 809 (1994) (concluding that a PRP could recover response costs put towards the identification of other PRPs); Exxon Corp. v. Hunt, 475 U.S. 355 (1986) (finding that State funds for third parties damaged by hazardous releases are not preempted by CERCLA).

[62] Hernandez, *supra* note 61, at 83. "[O]ne might assume Congress took great care to craft a clear statute. . . . [However,] CERCLA's legislative history is sparse, and some of is provisions are unclear and seemingly contradictory." *Id.*

[63] *Id.* at 83; *see also* Saleel V. Sabnis, Casenote, Aviall v. Cooper Industries: *The Emerging Controversy Behind CERCLA's Contribution Provision*, 16 VILL. ENVTL. L.J. 261, 264 (2005) (stating that although Congress had good intentions when enacting CERCLA, it drafted language that was incredibly ambiguous and subject to a great amount of litigation).

[64] The opinion written by Justice Thomas finding that parties voluntarily incurring cleanup costs can not obtain contribution under § 113 of CERCLA is thoroughly examined in Part III(B) below.

[65] *See infra* Part III.A.

[66] *See infra* Part III.B.

[67] *See infra* Part III.C.

[68] The federal government may clean up a contaminated area itself under 42 U.S.C. § 9604 (2000), or it may compel responsible parties to perform the cleanup under 42 U.S.C. § 9607 (2000). *See* Key Tronic Corp. v. United States, 511 U.S. 809, 814 (1994). The federal government can then recover the response costs from the PRP. *Cooper v. Aviall*, 543 U.S. at 161.

yet subject to suit could raise cost recovery claims against other PRPs.[69] In the past, some courts found that § 107(a)(4)(B)[70] authorized a cost recovery action for PRPs who voluntarily incurred response costs against another PRP.[71] Additionally, after CERCLA's enactment, litigation arose over whether a PRP that had been sued in a cost-recovery action could successfully obtain contribution from other PRPs.[72] The original 1980 CERCLA provisions did not use the word "contribution" or expressly authorize a defendant PRP a right of action for contribution from other PRPs.[73] However, many district courts held that a right of action for contribution could be implied from the statutory text or from federal common law.[74]

When Congress amended CERCLA with SARA in 1986, it responded to the confusion created from a lack of an express provision, creating a right of action for PRPs to obtain contribution.[75] Congress added § 113, which created an express cause of action for PRPs to obtain contribution during or

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[69] *Cooper v. Aviall*, 543 U.S. at 161.

[70] 42 U.S.C. § 9607(a)(4)(B) (2000). Section 9607(a)(4)(B) states:

> [A]ny person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for . . . any other necessary costs of response incurred by any other person consistent with the national contingency plan . . . .

42 U.S.C § 9607(a)(4)(B).

[71] *Cooper v. Aviall*, 543 U.S. at 161. *See, e.g.*, Wickland Oil Terminals v. Asarco, Inc., 792 F.2d 887, 890–92 (9th Cir. 1986); Walls v. Waste Res. Corp., 761 F.2d 311, 317–18 (6th Cir. 1985); Philadelphia v. Stephan Chem. Co., 544 F. Supp. 1135, 1140–43 (E.D. Pa. 1982).

[72] *Cooper v. Aviall*, 543 U.S. at 162.

[73] *Id.* The right of PRPs to obtain contribution from other PRPs was later added as a result of the Superfund Amendments and Reauthorization Act of 1986 (SARA). *See* Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99–499, 100 Stat. 1613 (1986) (codified in scattered sections of 42 U.S.C.).

[74] *See, e.g.*, United States v. New Castle County, 642 F. Supp. 1258, 1263–69 (D. Del. 1986) (stating that federal common law provides PRPs a right of action for contribution); Colorado v. Asarco, Inc., 608 F. Supp. 1484, 1486–93 (D. Colo. 1985) (finding that common law allows right of action for contribution); Wehner v. Syntex Agribusiness, Inc., 616 F. Supp. 27, 31 (E.D. Mo. 1985) (determining that the contribution right is implied from § 107(e)(2)).

[75] Wm. Bradford Reynolds & Lisa K. Hsiao, *The Right of Contribution Under CERCLA After* Cooper Industries v. Aviall Services, 18 TUL. ENVTL. L.J. 339, 342 (2005).

following any civil action under § 106 or § 107(a),[76] and a right of contribution for PRPs who have resolved their liability through an "administratively or judicially approved settlement."[77]

## B. *The* Cooper v. Aviall *Decision*

In December 2004, the Supreme Court, in an opinion written by Justice Thomas, delivered a crushing blow to PRPs' ability to obtain contribution from other PRPs.[78] The Court held that a PRP cannot obtain contribution from other PRPs if it has not yet been sued under § 106 or § 107(a) of CERCLA.[79] The case involved four contaminated sites in Texas that Aviall Services purchased from Cooper Industries in 1981.[80] Aviall discovered that the groundwater beneath the site became contaminated by leaks from the underground storage tank system and spills.[81] Aviall further discovered that the previous owner, Cooper, contributed to the contamination of the four sites.[82]

After making the discovery, Aviall voluntarily contacted the Texas National Resource Conservation Commission (TNRCC) to notify them of the

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[76] 42 U.S.C. § 9613(f)(1) (2000). Section 9613(f)(1) states:

> Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.

42 U.S.C. § 9613(f)(1).

[77] 42 U.S.C. § 9613(f)(3)(B) (2000). Section 9613(f)(3)(B) states: "A person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administratively or judicially approved settlement. . . ." 42 U.S.C. § 9613(f)(3)(B).

[78] *See* Cooper Indus., Inc. v. Aviall Services, Inc., 543 U.S. 157 (2004).

[79] *Id.* at 167.

[80] *Id.* at 163.

[81] *Id.* at 163–64.

[82] *Id.* Cooper conceded to the fact that it contributed to the contamination of the facilities, making it a PRP for the purposes of potential liability under CERCLA. Aviall Services, Inc. v. Cooper Indus., Inc., 263 F.3d 134, 137 (5th Cir. 2001).

contaminated sites.[83] The TNRCC responded by informing Aviall that it violated state environmental laws, directed Aviall to perform a cleanup at the site, and threatened an enforcement action if Aviall did not begin to remediate the sites.[84] However, the TNRCC and the EPA chose not to pursue judicial or administrative measures to force cleanup.[85] Aviall proceeded to voluntarily remediate the sites under the TNRCC's supervision, incurring approximately $5 million in cleanup costs.[86]

After remediating the sites, Aviall filed an action against Cooper to recover cleanup costs in the United States District Court for the Northern District of Texas.[87] The initial complaint advanced a cost recovery claim under § 107(a) and a claim for contribution under § 113(f)(1), as well as a state law claim.[88] Aviall amended the complaint and combined the two CERCLA actions into a claim for contribution under § 113(f)(1).[89] The United States Supreme Court held that § 113(f)(1) did not authorize the suits because Aviall voluntarily remediated the contaminated sites.[90] The first sentence of § 113(f)(1) states that "[a]ny person may seek contribution . . . during or following any civil action under section 9606 of this title or under section 9607(a) of this title."[91] The Supreme Court reasoned that the "natural" meaning of the first sentence "is that contribution may only be sought subject to the specified conditions, namely, 'during or following' a specified civil action."[92]

Aviall argued that "may" in § 113(f)(1) should be read as discretionary, not mandatory.[93] Therefore, if Aviall's interpretation were followed, then "during or following" would be one of a variety of instances where a PRP may seek contribution.[94] The Court rejected Aviall's argument, finding that "may" in the enabling clause only authorized contribution actions "during or

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[83] *Cooper v. Aviall*, 543 U.S. at 164.

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] *Cooper v. Aviall*, 543 U.S. at 164.

[90] *Id.* at 167.

[91] 42 U.S.C. § 9613(f)(1). Section 9606 is the United States Code designation for CERCLA § 106, and § 9607(a) is the United States Code designation for CERCLA § 107(a).

[92] *Cooper v. Aviall*, 543 U.S. at 165–66.

[93] *Id.* at 166.

[94] *Id.*

following" a specified civil action.[95] The Court also reasoned that Aviall's interpretation makes much of §§ 113(f)(1) and 113(f)(3)(B) superfluous, and that Congress would not have specified the conditions for bringing contribution claims if it intended to allow PRPs to bring contribution actions under any circumstances.[96]

Aviall also argued that the last sentence of § 113(f)(1) authorized its contribution action.[97] The last sentence, also known as the savings clause, states: "Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title."[98] The Court interpreted the sentence as not to eliminate other causes of action for contribution independent of § 113(f)(1).[99] The Court held that the savings clause did not allow contribution actions under § 113(f)(1) unless the action was brought during or following a § 106 or § 107(a) civil action.[100]

The Court then looked to all of § 113 to further demonstrate its conclusion.[101] The Court pointed to the other expressed method for obtaining

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[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] 42 U.S.C. § 9613(f)(1) (2000).

[99] *Cooper v. Aviall*, 543 U.S. at 166. The Court's opinion stated that the savings clause rebutted "any presumption that the express right of contribution provided by the enabling clause is the exclusive cause of action for contribution available to a PRP," but the savings clause is not itself a cause of action. *Id.* at 166–67. The Court stated that the savings clause did not expand § 113(f)(1) to allow PRPs to bring contribution actions outside of a § 106 or a § 107 civil action. *Id.* at 167. Also, the savings clause makes no mention of additional causes of action to obtain contribution outside of § 113(f)(1). *Id.* The Court concluded that "reading the savings clause to authorize [section] 113(f)(1) contribution actions" to actions brought prior to a § 106 or § 107(a) civil action "would again violate the settled rule that we must, if possible, construe a statute to give every word some operative effect." *Id.*

[100] *Id.* at 167; 42 U.S.C. § 9613(f)(1) (2000).

[101] *Cooper v. Aviall*, 543 U.S. at 167. Section 113(f) states:

> (f) Contribution.
>
> (1) Contribution. Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) . . . , during or following any civil action under section 9606 . . . or under section 9607(a) . . . . Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 or 9607 . . . .

contribution in § 113(f)(3)(B), which allows a PRP to obtain contribution after an administrative or judicially approved settlement that resolves liability to the United States or a state.[102] Section 113(g)(3) then provides a statute of limitations for contributions under §§ 113(f)(1) and 113(f)(3)(B), but does not provide a statute of limitations for contribution actions outside of §§ 113(f)(1) and 113(f)(3)(B).[103] Therefore, the Supreme Court found that in order to make a contribution claim under § 113(f), the PRP must fall within the conditions of either § 113(f)(1) or § 113(f)(3)(B).[104]

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> (2) Settlement. A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.
>
> (3) Persons not party to settlement.
>
> (A) If the United States or a State has obtained less than complete relief from a person who has resolved its liability to the United States or the State in an administrative or judicially approved settlement, the United States or the State may bring an action against any person who has not so resolved its liability.
>
> (B) A person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not party to a settlement referred to in paragraph (2).
>
> (C) In any action under this paragraph, the rights of any person who has resolved its liability to the United States or a State shall be subordinate to the rights of the United States or the State. Any contribution action brought under this paragraph shall be governed by Federal law.

42 U.S.C. § 9613(f) (2000).

[102] *Cooper v. Aviall*, 543 U.S. at 167.

[103] *Id.*; 42 U.S.C. § 9613(f). The statute of limitations for § 113(f) contribution actions is provided in § 113(g)(3). Section 113(g)(3) states:

> No action for contribution for any response costs or damages may be commenced more than 3 years after—
>
> (A) the date of judgment in any action under this chapter for recovery of such costs or damages, or
>
> (B) the date of an administrative order under section 9622(g) of this title (relating to de minimis settlements) or 9622(h) of this title (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.

42 U.S.C. § 9613(g)(3) (2000).

[104] *Cooper v. Aviall*, 543 U.S. at 167; 42 U.S.C. § 9613(f).

### C. *Section 107(a)(4)(B) Cost Recovery Actions*

Aviall finally argued, and the dissenting Justices agreed, that even if it could not seek contribution under § 113(f)(1), it may seek a cost recovery action under § 107(a)(4)(B).[105] The majority refused to address the issue because it had not been properly briefed.[106] However, it appears that there is no support for an implied cause of action under § 107(a) either in the language of § 107(a), or in Congress's deliberation over the addition of § 113(f).[107] In fact, many circuits have rejected PRPs' attempts at obtaining cost recovery solely under § 107(a)(4)(B).[108] It is likely, if the issue of contribution through § 107(a) appears before the Supreme Court, that the Court will find that PRPs may only obtain contribution through § 113(f).[109] First, it can be easily argued that the enactment of § 113(f) "superseded . . . any implied right of contribution . . . under section 107(a) of

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[105] *Cooper v. Aviall*, 543 U.S. at 168; 42 U.S.C. § 9607(a)(4)(B) (2000). Section 9607(a)(4)(B) states:

> [A]ny person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for . . . any other necessary costs of response incurred by any other person consistent with the national contingency plan;

42 U.S.C. § 9607 (a)(4)(B).

[106] *See Cooper v. Aviall*, 543 U.S. at 168.

[107] Reynolds & Hsiao, *supra* note 75, at 345.

[108] *Id.* at 345 n.37; *see* Bedford Affiliates v. Sills, 156 F.3d 416, 423–24 (2d Cir. 1998) (stating that "[t]he district court in the present case properly held that [the PRP] could not pursue a 107(a) cost recovery claim against [other PRPs] due to its status as a potentially responsible person. . . . CERCLA 113(f) plainly governs such contribution actions."); Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R. Co., 142 F.3d 769, 776 (4th Cir. 1998) (holding that because the case before the court involved only PRPs, the PRP must seek contribution under § 113); *see also* Reynolds & Hsiao, *supra* note 75, at 345 n.37 (providing citations to cases in the first, fifth, sixth, seventh, ninth, tenth, and eleventh circuits where PRPs could not pursue 107(a) cost recovery claims).

[109] Reynolds & Hsiao, *supra* note 75, at 345. Neither § 107(a), nor the addition of § 113(f) under SARA creating an "explicit right of contribution under CERCLA," supports an implied contribution action under § 107(a). *Id.* "Moreover, with the enactment of SARA, past efforts by PRPs to invoke section 107(a)(4)(B)'s cost recovery provisions in this manner have been uniformly rejected by every federal appeals court to have entertained the question." *Id.*

CERCLA."[110] Second, there is a strong argument that the "any other persons" language of § 107(a) refers only to the government, innocent parties or landowners, or "Good Samaritans,"[111] because they cannot maintain a contribution action under § 113(f).[112] Also, the statute of limitations under § 113 for contribution actions is three years, but § 107(a) does not have a statute of limitations for contribution suits.[113] Allowing PRPs to obtain contribution through a § 107(a) action does not appear to be feasible without the court acting as a legislature and rewriting the statute.[114] Therefore, it appears that if the Supreme Court addresses the issue of PRPs obtaining contribution under § 107(a), it will likely find that PRPs' only method of obtaining contribution is through § 113(f).[115]

After *Cooper v. Aviall*, there has been a split amongst the circuits over the issue of whether a PRP can recover costs under § 107(a).[116] Some courts find that the party asserting the cost recovery claim must be an innocent party in order to recover costs under § 107(a).[117] However other courts, realizing

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[110] *Id.* at 345–46. The contribution provisions enacted as part of SARA has been interpreted by many to codify the implied right of contribution. *Id.* at 346 n.39.

[111] *Id.* at 350.

[112] *Id.* at 346–47.

> There is the language of section 107(a), which identifies the four categories of "covered persons" who may be held jointly and severally liable for the costs of cleaning up hazardous waste sites. These "covered persons" include essentially private PRPs who own or owned contaminated property, who transported or assisted in the transport of hazardous substances, and/or who contributed ... to a contaminated condition. On its face section 107(a) reserves private rights of action to "any other person" seeking to recover from these "covered" PRPs whatever necessary response costs that "other person" may have legitimately incurred. While not entirely free from doubt ... the "other persons" identified in subparagraph B refer to private parties *other than* those individuals described in section 107(a)(1)–(4) as "covered" PRPs.

*Id.* (emphasis added).

[113] *Id.* at 349.

[114] *See id.* at 349 n.55.

[115] *See* Reynolds & Hsiao, *supra* note 75, at 349–50.

[116] *See infra* notes 117–18.

[117] *See* E.I. Dupont Nemours & Co. v. United States, 460 F. 3d 515, 529 (2006); Kaladish v. Uniroyal Holding, Inc., No. 300–854, 2005 U.S. Dist. LEXIS 17272, at *9 (D. Conn. Aug. 9, 2005); CadleRock Properties Joint Venture, L.P. v. Schilberg, No. 301–896, 2005 U.S. Dist. LEXIS 14701, at *27 (D. Conn. July 18, 2005); Benderson Dev. Co., Inc. v. Neumade Products Corp., No. 98–0241, 2005 U.S. Dist LEXIS 14943, at *30–32 (W.D.N.Y. June 13, 2005); Montville Twp. v. Woodmont Builders, LLC, No. 03–2680, 2005 U.S. Dist. LEXIS 18079, at *18–19 (D.N.J. Aug. 12, 2005).

that depriving a PRP of a remedy creates an incentive for parties to wait to be sued before incurring response costs, and potentially causing even greater environmental damage, hold that a PRP can recover response costs under § 107(a).[118] When this issue reaches the Supreme Court, the Court, unfortunately, will likely follow the former interpretation rather than the latter.[119]

If the § 107(a) issue were to reach the Supreme Court, and the Court ruled that PRPs could obtain contribution through § 107(a), then its decision in *Cooper v. Aviall* would become virtually irrelevant.[120] The United States Court of Appeals for the Second Circuit has chosen to render the Supreme Court's decision in *Cooper v. Aviall* irrelevant by allowing a PRP to obtain contribution through § 107(a).[121] In *Con Ed v. UGI*, Con Ed sought to obtain contribution for cleanup costs from UGI.[122] After filing suit, Con Ed negotiated a "voluntary cleanup agreement" with the New York State Department of Environmental Conservation.[123] The Second Circuit chose to support a policy of encouraging voluntary cleanups, unlike the Supreme

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[118] Metro Water Reclamation Dist. of Greater Chicago v. N. Am. Galvanizing & Coatings, Inc., No. 05–3299, 2007 U.S. App. LEXIS 913, at *31–32 (7th Cir. Jan. 17 2007); Atl. Research Corp. v. United States, 459 F.3d 827 (8th Cir. 2006), *cert. granted*, 75 U.S.L.W. 3384 (U.S. Jan. 19, 2007) (No. 06–562); Consol. Edison Co. of N.Y., Inc. v. UGI Utilities, Inc., 423 F.3d 90, 100 (2d Cir. 2005); Syms v. Olin Corp., 408 F.3d 95, 106 n.8 (2d Cir. 2005); Adobe Lumber, Inc. v. Hellman, 415 F. Supp. 2d 1070, 1078–79 (E.D. Cal. 2006) (The defendants filed a motion to dismiss Adobe's § 107(a) claim for contribution. The judge denied defendant's motion, stating that he had "difficulty imagining that the Ninth Circuit would prevent PRPs from pursuing contribution claims for clean up costs incurred voluntarily."); Vine St., LLC v. Keeling, 362 F. Supp. 2d 754, 763 (E.D. Tex. 2005).

[119] *See generally* Reynolds & Hsiao, *supra* note 75, at 345–51 (discussing the impact of the Court's decision in *Cooper v. Aviall*).

[120] Aaron Gershonowitz, *'Con Ed v. UGI': Is the Supreme Court's* 'Aviall' *Now Irrelevant?*, *in* 234 N.Y.L.J. 116 (Dec. 16, 2005), *available at* http://www.fcsmcc.com/news/pdfs/nylj_121605.pdf.

[121] *Con Ed v. UGI*, 423 F.3d at 100.

> For these reasons, we hold that section 107(a) permits a party that has not been sued or made to participate in an administrative proceeding, but that, if sued, would be held liable under section 107(a), to recover necessary response costs incurred voluntarily, not under a court or administrative order or judgment.

*Id.* This case involved an agreement where Con Ed voluntarily agreed to begin cleanups at a number of manufactured gas plants that it or its predecessors may have formerly owned or operated. *Id.* at 93.

[122] *Id.* at 92; Gershonowitz, *supra* note 120.

[123] *Con Ed v. UGI*, 423 F.3d at 93; Gershonowitz, *supra* note 120.

Court's decision in *Cooper v. Aviall* which discourages voluntary cleanups.[124] Although the Second Circuit's finding would be considered correct by many commentators based on the policy it promotes, the decision, if followed by other courts, would render the decision in *Cooper v. Aviall* irrelevant.[125] Rendering statutory precedent moot, without a Congressional response, is not a course that the Supreme Court is likely to take.[126] Therefore it appears that an attempt by a PRP to obtain contribution under § 107(a)(4)(B) will likely fail if the issue reaches the Supreme Court, and PRPs may only obtain contribution if sued under § 106[127] or § 107(a)[128] of CERCLA, or if the PRP has completely resolved its liability through either an administratively or judicially approved settlement.

## IV. EFFECTS OF *COOPER V. AVIALL* ON NEGOTIATED SETTLEMENTS

The Supreme Court's decision in *Cooper v. Aviall* may cause PRPs to wait for the EPA to file a civil suit against the PRP before incurring response costs.[129] The outcome in *Cooper v. Aviall* erases the advantages that PRPs gain from voluntarily incurring response costs or remediating contaminated sites and beginning negotiations with the EPA or state administrative agencies.[130] "The result is that far fewer [CERCLA] cleanup actions will occur and that the public fisc will bear the enforcement costs of those that

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[124] Gershonowitz, *supra* note 120 (discussing that "[t]he Second Circuit also examined the relevant policy implications and, less than a year after the Supreme Court in *Aviall* appeared to discourage voluntary cleanups, issued a decision clearly aimed at encouraging voluntary cleanups").

[125] *See id.*

[126] *See* Amy C. Barrett, *Statutory Stare Decisis in the Court of Appeals*, 73 GEO. WASH. L. REV. 317, 348–49 (2005) (stating that if Congress does not agree with the Court's interpretation, then it is Congress's job to fix the problem). In her article, Professor Barrett cited numerous Supreme Court and Court of Appeals cases in support of her statement. *See id.* at 348 n.164; *see also* Reves v. Ernst & Young, 494 U.S. 56, 74 (1990) (Stevens, J., concurring) (stating that interpretations of federal statutes should remain undisturbed until Congress chooses to say otherwise); Patterson v. McLean Credit Union, 491 U.S. 164, 172–73 (1989) (stating that courts should be weary of overruling statutory precedent because Congress has the opportunity to overrule the prior decision); Ill. Brick Co. v. Illinois, 431 U.S. 720, 736 (1977) (explaining that "considerations of stare decisis weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation").

[127] *See* 42 U.S.C. § 9606 (2000).

[128] *See* 42 U.S.C. § 9607(a) (2000).

[129] *See, e.g.*, Millan, *supra* note 2, at 214.

[130] *See* Vandenbergh, *supra* note 38, at 2089–90.

do."[131] This Part discusses the impact of the Court's decision on PRPs' abilities and willingness to attempt to reach a negotiated settlement with the EPA. Section A briefly discusses how the Supreme Court's decision in *Cooper v. Aviall* undermines the EPA's policy on the use of ADR to resolve environmental conflicts.[132] Section B examines the loss of bargaining power that PRPs may have suffered since the Court's decision in *Cooper v. Aviall.*[133] Section C discusses the impact of the Court's decision on transaction costs and the efficiency of environmental cleanups.[134]

### A. *The Undermining of an Agency Policy*

The Supreme Court's decision in *Cooper v. Aviall* strikes a strong blow against those who promote the use of ADR in the environmental field. The EPA policy on ADR points to the numerous benefits of ADR.[135] First, ADR leads to the faster resolution of issues.[136] Second, ADR allows the parties to achieve more creative, satisfying, and enduring solutions.[137] Third, the use of ADR reduces transaction costs for both the EPA and the PRP.[138] Fourth, ADR promotes "a culture of respect and trust among the EPA, its stakeholders, and its employees," leading to "improved working relationships."[139] Finally, the use of ADR "increases the likelihood of compliance with environmental laws and regulation," creates "broader stakeholder support for agency programs," and produces "better environmental outcomes."[140] In destroying the incentive for voluntary cleanups, the Court undermines each of these benefits of ADR.

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[131] *Id.* at 2090.

[132] *See infra* Part IV.A.

[133] *See infra* Part IV.B.

[134] *See infra* Part IV.C.

[135] *See* Environmental Protection Agency Policy on Alternative Dispute Resolution, 65 Fed. Reg. 81,858–59 (Dec. 27, 2000) (stating that ADR creates a more efficient working place and increases cooperation with state and local governments, PRPs, public interest groups, and the public).

[136] *Id.* at 81,858.

[137] *Id.*

[138] *Id.*

[139] *Id.* at 81,859.

[140] *Id.*

First, the Supreme Court's decision in *Cooper v. Aviall* does nothing to promote the faster resolution of issues.[141] A PRP's best option now is to wait for litigation because the Court has destroyed the PRP's incentive to voluntarily incur cleanup costs. PRPs are now more apt to go through the long and protracted litigation process in order to be able to obtain contribution rights from other PRPs.[142] Second, litigation will likely not result in "[m]ore creative, satisfying and enduring solutions."[143] Litigation generally does not allow for third parties such as community groups and public interest groups to become involved in finding an amicable resolution to issues that benefit all participating parties.[144] Third, increasing the amount of litigation in CERCLA contribution actions will cause a dramatic increase in transaction costs.[145] Finally, the Court's decision could possibly decrease the "likelihood of compliance with environmental laws and regulation[s]," lessening "stakeholder support for agency programs."[146]

### B. *Decreased Bargaining Power for PRPs*

An important advantage for PRPs who voluntarily incur cleanup costs is the increased bargaining power gained in negotiations.[147] Environmental negotiations are more likely to be successful if the balance of power between

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[141] *Compare* MEMORANDUM ON ENVIRONMENTAL CONFLICT RESOLUTION, *supra* note 5 (stating the CEQ's policy goals for resolving environmental conflicts).

[142] *Id.*

[143] *See* Environmental Protection Agency Policy on Alternative Dispute Resolution, 65 Fed. Reg. 81,858 (Dec. 27, 2000).

[144] *See* Niermann, *supra* note 4, at 404–06 (stating that Congress wished to gain widespread public support for the remediation of contaminated hazardous waste sites under CERCLA).

[145] *See infra* Part IV.C.

[146] *See* Environmental Protection Agency Policy on Alternative Dispute Resolution, 65 Fed. Reg. at 81,859; *see also* Diane R. Smith & Summer L. Nastich, Cooper Industries, Inc. v. Aviall Services, Inc., 47 ORANGE COUNTY LAW. 18, 20–21 (2005) (stating that "because *Cooper* encourages recalcitrance on the part of PRPs, agencies will be under significant pressure to use their enforcement authority to bring otherwise unwilling parties to the table").

[147] *See generally* Robert S. Adler & Elliot M. Silverstein, *When David Meets Goliath: Dealing with Power Differentials in Negotiations*, 5 HARV. NEGOT. L. REV. 1, 5 (2000) (discussing how parties in negotiations attempt to gain greater bargaining power to improve their position in negotiations).

the parties can be brought closer to equilibrium.[148] Because of CERCLA's strict liability regime, the scale already tips heavily towards the EPA in relation to relative bargaining power between the parties.[149] Thus, PRPs will receive no benefits from negotiation and other ADR techniques employed between the PRP and the EPA if the PRP's already limited bargaining power is diminished.[150]

But the Court's decision in *Cooper v. Aviall* may cause PRPs to choose litigation over negotiated settlements.[151] The Court's decision leaves little incentive to enter into voluntary cleanups and negotiations.[152] If a PRP, after receiving notice from the EPA, begins to voluntarily incur cleanup costs and also begins negotiations with the EPA or a state administrative agency, it may be precluded from recovering those cleanup costs if the PRP cannot obtain an administrative or judicially approved settlement.[153]

Thus, a PRP wishing to perform a voluntary cleanup of a property is at the mercy of the administrative agency to reach an administrative or judicially approved settlement because the PRP is left with little or no bargaining power in negotiations. This proposition can be analogized to the plight of consumers and potential employees who have little bargaining power in negotiating arbitration agreements.[154] A PRP may be forced to sacrifice any potential bargaining power in order to reach a speedy settlement

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[148] *See* Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139, 177 (2005) (stating that studies of environmental disputes have shown that increased bargaining power has produced increased success in negotiations) (citation omitted).

[149] *See* ROBERT V. PERCIVAL, CHRISTOPHER H. SCHROEDER, ALAN S. MILLER & JAMES P. LEAPE, ENVIRONMENTAL REGULATION LAW, SCIENCE, AND POLICY 272 (4th ed. 2003) [hereinafter PERCIVAL].

[150] *See* Wood, *supra* note 4, at 429 n.351 (stating that "[c]ommentators emphasize that ADR can only be fair if the parties have equality in bargaining position"); *see generally* DOUGLAS J. AMY, THE POLITICS OF ENVIRONMENTAL MEDIATION 80–82 (1987) (finding that "without a relative balance of power between the disputing parties, sincere negotiations [will be] unlikely to take place").

[151] *See* Millan, *supra* note 2, at 214.

[152] *See* Callie Campbell, Note, Cooper Industries, Inc. v. Aviall Services, Inc.: *A Superfast End to Voluntary Cleanups and Efficient Environmental Management*, 13 S.C. ENVTL. L.J. 203, 205–06 (2005) ("[PRPs] have little financial incentive to conduct voluntary cleanups anymore, leaving more of the burden of investigating sites, funding cleanups, and bringing causes of action in the hands of the already busy EPA.").

[153] *Cooper v. Aviall*, 543 U.S. at 166–67.

[154] *See, e.g.*, Sarah R. Cole, *Arbitration and State Action*, 2005 BYU L. REV. 1, 48 n.220 (2005).

so that it may obtain contribution from other PRPs.[155] Much like the initiation of a general employee-employer relationship, a PRP who voluntarily begins cleanup is now forced to negotiate on the EPA's terms. The PRP is given no benefit of its efforts to be a responsible corporate citizen. It could be argued that this kind of power imbalance between the parties remains consistent with the imbalance that exists in consumer-seller and employee-employer relationships, and should thus be written off as collateral damage. After all, an employee often times must sacrifice some of her potential advantages in order to obtain employment; likewise, a voluntary PRP may sacrifice many of its advantages in negotiations to obtain contribution. But a fundamental difference exists between the employee and the PRP. The employee seeks to improve her own situation, whereas the voluntary PRP seeks to improve the public health and welfare of society by beginning a voluntary cleanup. Not only does the voluntary PRP protect its own interests, but in the voluntary cleanup scenario, it seeks to protect the interests of society as a whole. Based on policy reasons, including the need to protect the environment, the voluntary PRP is entitled to more bargaining power when negotiating a settlement with the EPA. On the other hand, after *Cooper v. Aviall*, if the PRP simply waits for the EPA or a state administrative agency to bring a civil suit against the PRP, then it may seek contribution for cleanup costs under § 113 at any point after the EPA brings the civil suit.[156]

It appears that when Congress drafted § 113, it did not consider PRPs incurring voluntary cleanup costs.[157] The outcome of *Cooper v. Aviall*, which appears to be a correct statutory interpretation, creates an absurdity that must not go ignored. PRPs who voluntarily incur cleanup costs cannot receive contribution until they are sued or reach an administrative or judicially approved settlement,[158] which generally occurs after substantial cleanup costs have been incurred. But PRPs who wait—possibly in bad faith—to have a civil suit brought against them may obtain contribution immediately upon the suit being brought.[159] There exists no rationale to explain why PRPs

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[155] *See* Sarah R. Cole, *Arbitration and the Batson Principle*, 38 GA. L. REV. 1145, 1158 (2004) (discussing in the employment context that "[s]treamlined procedures and speed may disproportionately impact the party who had less bargaining power when the initial agreement was negotiated").

[156] *See* 42 U.S.C. § 9613(f)(1); *see also Cooper v. Aviall*, 543 U.S. at 167.

[157] *See* Reynolds & Hsiao, *supra* note 75, at 353–55.

[158] *Cooper v. Aviall*, 543 U.S. at 166–67.

[159] *See* 42 U.S.C. § 9613(f)(1); *see also* Smith & Nastich, *supra* note 146, at 20–21. The authors further explained that "[r]ecalcitrant PRPs will benefit from the *Cooper* decision, since it in effect shields PRPs from liability for their share of response costs if

who voluntarily incur response costs are punished and PRPs who wait for litigation in hopes of avoiding response costs are rewarded.[160]

### C. *Increased Transaction Costs and Decreased Efficiency*

Because of the potential for increased litigation as a result of the decision in *Cooper v. Aviall*, transaction costs for the cleanup of contaminated sites will likely rise for PRPs, the EPA, and state administrative agencies.[161] Having a "litigation-driven system funnels too much CERCLA money into transaction costs and too little into site cleanup."[162] The costs incurred as a result of litigation can often exceed the costs of a PRP voluntarily incurring response costs and entering into negotiations with the EPA or a state administrative agency.[163] Litigation under CERCLA typically generates high transaction costs.[164] Often times, the transaction costs are greater than the costs incurred to investigate the contamination and remediate the site.[165] For example, the Rand Institute conducted a study of transaction costs versus investigation and remediation costs of seventy-three CERCLA sites in 1992.[166] Of the seventy-three sites studied, twenty had transaction costs "equal to or greater than the expenditures for site assessment and

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another PRP voluntarily cleans up a site prior to an enforcement action." Smith & Nastich, *supra* note 146, at 20. Additionally, because *Cooper v. Aviall* will cause PRPs to become non-cooperative with the government, agencies will be forced to more frequently use their enforcement powers to ensure that PRPs take part in the cleanup of contaminated sites. *Id.* at 21.

[160] PRPs who voluntarily remediate their contaminated property deserve to be rewarded for their willingness to help protect the public health and welfare and defray the costs that would be compounded by inaction. *See* Sabnis, *supra* note 63, at 261 (stating that because of the potentially high cleanup costs of contaminated sites, "property owners who exhibit the voluntary initiative to clean their own land before hazardous waste accumulates deserve praise").

[161] Niermann, *supra* note 4, at 413.

[162] *See* PERCIVAL, *supra* note 149, at 284.

[163] In a recent memorandum, the OMB and CEQ listed the challenges faced by the federal government when approaching environmental conflicts. *See infra* Part V.B.

[164] Niermann, *supra* note 4, at 413.

[165] *Id.* This is not to say that investigation and remediation costs at a contaminated site are inexpensive relative to the transaction costs. In 1994, it was determined that the "average cost of CERCLA remediation" was approximately $25,000,000 per site. Payson R. Peabody, Comment, *Taming CERCLA: A Proposal to Resolve the Trustee "Owner" Liability Quandary*, 8 ADMIN. L.J. AM. U. 405, 421 (1994) (citation omitted).

[166] Niermann, *supra* note 4, at 413 n.165.

remediation."[167] When analyzing all of the sites, twenty-one percent of the costs incurred were transactional.[168] These transactional costs due to litigation are paralyzing to both the EPA and PRPs.[169] In order to limit transaction costs, the use of negotiated settlements and ADR to resolve CERCLA disputes must continue to be a goal that the EPA can achieve and that the courts should respect.[170]

Additionally, the increase in litigation will cause a decrease in efficiency in the parties' ability to resolve the conflict and in the assessment and remediation of the site.[171] The adversary system promotes a system where PRPs defer, deny, and delay responsibility for the cleanup of a contaminated site.[172] As the parties proceed to litigate responsibility for the cleanup, the contamination may spread, which could further increase the cleanup costs

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[167] *Id.*

[168] *Id.*

[169] *See* Niermann, *supra* note 4, at 413 (stating that "CERCLA litigation frequently generates disproportionate transaction costs, and in an alarming number of cases the transaction costs equal or exceed the expenditures for site study and remediation"). In addition to the increased costs incurred by PRPs as a result of increased litigation, the Court's decision in *Cooper v. Aviall* will stretch the EPA's already limited resources even thinner. *See* Sophia Strong, Note, Aviall Services v. Cooper Industries*: Implications for the United States' Liability under CERCLA, The "Superfund Law"*, 56 HASTINGS L.J. 193, 200 (2004). The EPA's limited resources "severely constrain the EPA's ability to monitor the numerous hazardous sites throughout the country and initiate clean-up operations on a nation-wide basis." *Id.* (citation omitted). Because the EPA's resources are so limited, a collaborative approach is necessary to achieve its goal of protecting the public health and welfare. *See* Molly J. Walker Wilson, *A Behavioral Critique of Command-and-Control Environmental Regulation*, 16 FORDHAM ENVTL. L. REV. 223, 239 (2005).

[170] *See* Samson, *supra* note 19, at 530. "If ADR is used at Superfund sites, parties can reach more rapid conclusions to disputes and spend less money on transaction costs . . . ." *Id.*

[171] *See* Campbell, *supra* note 152, at 205–06. "The Supreme Court's ruling is likely to have a monumental impact on businesses' approach to land contamination, CERCLA's efficacy in managing what should become an even greater responsibility for the EPA, and CERCLA provisions' efficiency in implementing these responsibilities." *Id.* at 205.

[172] *See* Niermann, *supra* note 4, at 414 (finding that "[t]he delay is due to the difficulty of navigating strict procedural formalities and an adversarial environment"); Jerry L. Anderson, *The Hazardous Waste Land*, 13 VA. ENVTL. L.J. 1, 5 (1993) (stating that PRPs slow down the cleanup process by constantly questioning every decision the agency makes, causing the EPA to develop a comprehensive administrative record in order to provide support for every decision involving the contaminated site).

and further endanger the public health and welfare.[173] The spread of contamination may occur at a slow rate, depending on the media that is impacted, and the danger to the public health may not immediately increase because of short delay.[174] However, litigation tends to proceed at a slow rate as well.[175] For example, the litigation in *Cooper v. Aviall* took seven years to reach the Supreme Court, and litigation on different issues is proceeding through the court system as of the time of this Note's publication.[176] The delayed response to environmentally impacted locations caused by litigation does little to promote efficiency in cleaning up contaminated sites.[177]

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[173] *See generally* Lawrence Ng, Note, *A Drastic Approach to Controlling Groundwater Pollution*, 98 YALE L.J. 773 (1989) (discussing the problems of groundwater pollution and current federal laws which address groundwater pollution).

[174] For an overview and explanation of groundwater transport, see generally Gabriel Eckstein & Yoram Eckstein, *A Hydrogeological Approach to Transboundary Ground Water Resources and International Law*, 19 AM. U. INT'L L. REV. 201, 207–22 (2003).

[175] Lisa A. Kloppenberg, *Implementation of Court-Annexed Environmental Mediation: The District of Oregon Pilot Project*, 17 OHIO ST. J. ON DISP. RESOL. 559, 562 (2002) (discussing how "[i]n the litigation process, environmental cases are resource-intensive and slow moving in part because they tend to involve scientific uncertainties") (citation omitted); *see also* Nancy A. Welsh, *Stepping Back Through the Looking Glass: Real Conversations with Real Disputants About Institutionalized Mediation and its Value*, 19 OHIO ST. J. ON DISP. RESOL. 573, 602–03 (2004). "[M]ediation offers attractive time and cost savings" as compared to the slow moving and expensive process of litigation. *Id.* (citation omitted).

[176] *See* 19–3 MEALEY'S POLLUTION LIABILITY REPORT 5 (2005). Aviall Services, Inc. is now pursuing a § 107(a) cost recovery action against Cooper Industries, Inc. *Id.* Cooper has filed for summary judgment arguing that § 107(a) only applies to "non-responsible" or "innocent" parties. *Id.* Aviall argues that there is "[n]othing in the plain language of [§] 107(a)(4)(B) [indicating] that 'any other person' is limited to innocent parties." *Id.* Additionally, Aviall is trying to have its state law claims reinstated. *Id.* On August 8, 2006 the United States District Court for the Northern District of Texas held that Aviall could not recover under § 107(a). Aviall Services, Inc. v. Cooper Indus., Inc., No. 397–1926, 2006 U.S. Dist. LEXIS 55040 (N.D. Tex Aug. 8, 2006). The district court's ruling is now on appeal to the United States Court of Appeals for the Fifth Circuit. *See* 20–5 MEALEY'S POLLUTION LIABILITY REPORT 4 (2007).

[177] *See* PERCIVAL, *supra* note 149, at 284 (stating that the cleanup process of environmentally impacted sites is usually slow and very ineffective). Obviously, these concerns do not necessarily apply to the situation presented by *Cooper v. Aviall*, seeing that a substantial portion of the cleanup has already been accomplished. But the circumstances will apply to future cases since the incentive to voluntarily cleanup environmentally impacted sites and negotiate with the EPA or state administrative agencies no longer exists.

Litigation only serves to increase transaction costs and to slow down the process of remediating contaminated sites.[178]

## V. POTENTIAL FOR CONGRESS AND STATE ADMINISTRATIVE AGENCIES TO CLEAN UP THE MESS OF *COOPER V. AVIALL*

The outcome in *Cooper v. Aviall* once again brings to light a question asked by Justice Harry Blackmun in *Sierra Club v. Morton*:[179] must the law "be so rigid and our procedural concepts so inflexible that we render ourselves helpless when the existing methods and the traditional concepts do not . . . prove to be entirely adequate for new issues?"[180] The Court in *Cooper v. Aviall* decided to follow the path of rigid interpretation of an environmental statute, even though the result of the interpretation is to the detriment of the EPA, PRPs, and all of society in general. This Part discusses a potential solution to the problems created by the Supreme Court's decision.[181] Section A discusses potentially amending § 113(f) of CERCLA to allow for PRPs who incur voluntary cleanup costs and begin negotiations with the EPA or a state administrative agency to obtain contribution from other PRPs.[182] Section B advocates for the increased use of ADR under CERCLA and the environmental field in general.[183]

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[178] This is not to say that all PRPs will cease to perform voluntary cleanups. Smith & Nastich, *supra* note 146, at 20. For example, "some PRPs will perform voluntary cleanups to prepare property for sale, maintain value, prevent contaminant migration, and avoid liability to third parties such as adjacent property owners." *Id.*

[179] Sierra Club v. Morton, 405 U.S. 727, 755–56 (1972). In a challenge of a proposed ski resort in the Mineral King Valley of the Sierra Nevada Mountains, the Court held that "a mere 'interest in [an environmental] problem' . . . is not sufficient by itself to render the organization 'adversely affected . . . .'" *Id.* at 739. The Court found that the Sierra Club had to show that specific members were adversely affected by the proposed ski resort. *Id.* at 740.

[180] *Id.* at 755–56 (Blackmun, J., dissenting).

[181] Another possible solution for PRPs, the EPA, and state agencies to circumvent the Court's decision will not be discussed in this Note. The potential solution that will not be discussed involves the PRP contacting the appropriate agency and requesting that the agency issue an administrative order or file a civil suit against the PRP immediately in order for the PRP to file contribution actions against other PRPs. The mere potential situation of a PRP having to call the EPA or a state agency and asking the agency to sue it demonstrates that this is not a viable long term solution to the problem created by the Court's decision in *Cooper v. Aviall.*

[182] *See infra* Part V.A.

[183] *See infra* Part V.B.

### A. *Potential Congressional Amendment of § 113(f) of CERCLA*

Congress needs to formally amend § 113(f) in order to restore the incentive for PRPs to voluntarily incur cleanup costs while negotiating a final settlement.[184] Otherwise, the state of environmental law may revert back to the times before CERCLA's enactment.[185] Congress should evaluate the impact of the decision in *Cooper v. Aviall* and determine whether CERCLA § 113(f) should be amended to allow PRPs voluntarily incurring cleanup costs to obtain contribution from other PRPs. It appears that § 107(a) of CERCLA does not allow PRPs to recover response costs.[186]

Unfortunately, the 109th Congress did not consider the environment to be a particularly important issue.[187] However, the 110th Congress should be concerned about the impact of *Cooper v. Aviall* on PRPs. In recent years Congress has significantly changed its regulation of corporate responsibility in America.[188] However, many PRPs have been practicing corporate responsibility since the enactment of CERCLA by voluntarily entering into negotiations with the EPA and state administrative agencies, as well as

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[184] A few members of the Senate failed in an attempt to slip an eleventh hour amendment to § 113(f) as part of a highway bill. *Failed Senate* Aviall *Amendment Suggests Long Haul for Industry Fix*, ENVTL. POL'Y. ALERT, Mar. 1, 2006, at 1. In light of the recent Abramoff lobbying scandal, and the fact that the general public may now be aware of the potentially corrupt nature of eleventh hour amendments, it is unlikely that Congress will allow the amendment to slide by attached to another bill. *Id.*

[185] For example, PRPs choosing to wait for the EPA to bring a civil suit against them may allow contaminated sites to go without further investigation or remediation. *See* Smith & Nastich, *supra* note 146, at 20–21. Even worse, PRPs may decide to avoid investigating potential contamination altogether, in order to avoid the hassles of enforcement. *Id.* Fortunately, most PRPs today are responsible and do not wish to repeat the mistakes of the past, but *Cooper v. Aviall* has not done today's PRP any favors. *See generally* Valerie A. Zondorak, *A New Face in Corporate Environmental Responsibility: The Valdez Principles*, 18 B.C. ENVTL. AFF. L. REV. 457, 469 (1991) (discussing the corporate response to increased environmental liability).

[186] Reynolds & Hsiao, *supra* note 75, at 345.

[187] *See* Ira M. Gottlieb, *The March Hare, Mad Hatter and Alice Return to Superfund: The Implications of* Cooper Industries Inc. v. Aviall Services, Inc., 36 TRENDS 4, 13–14 (Mar.–Apr. 2005) (stating that "given current Congressional priorities, such as tort reform and judicial nominations, such a legislative fix may be a long time in the making, if it occurs at all").

[188] *See* Sarbanes Oxley Act of 2002, Pub L. No. 107–204, 116 Stat. 745 (2002) (codified as amended in scattered sections of 15 U.S.C.) (acting in response to corporate disasters, such as Enron and WorldCom, Congress enacted the act to increase corporate responsibility).

incurring response and cleanup costs.[189] The Court's decision in *Cooper v. Aviall* destroys the incentive for PRPs to voluntarily admit fault and clean up contaminated sites.[190] The PRP can only obtain contribution if subjected to a civil suit under § 106 or § 107(a) of CERCLA or if the PRP has completely resolved its liability through an administratively or judicially approved settlement.[191] A PRP must then evaluate whether it is worth the risk to enter into negotiations if an administratively or judicially approved settlement completely resolving its liability is not attainable.[192] Therefore, Congress must amend CERCLA to allow PRPs who voluntarily enter into negotiations with the EPA or state administrative agencies to obtain contribution from other PRPs.

Amending § 113(f) to allow PRPs who voluntarily incur response and cleanup costs provides a simple solution to the problems created by *Cooper v. Aviall.*[193] A proposed text of a possible amendment is as follows:

> (4) Voluntary Cleanup and Negotiations. A potentially responsible party (PRP) who has voluntarily incurred cleanup costs, and entered into negotiations with the United States or a State in order to resolve liability with the United States or a State, may seek contribution from any other potentially responsible party (PRP) who is not also a party to negotiations involving the contaminated site.

By allowing PRPs to immediately obtain contribution upon voluntarily incurring cleanup costs and entering into negotiations with the United States or a State, PRPs are once again given bargaining power and a choice when considering how to pursue handling an environmental conflict. PRPs voluntarily incurring cleanup costs could then obtain contribution "during or following" the initiation of negotiations with the EPA or a state administrative agency, much like those PRPs that choose litigation may obtain contribution "during or following" a civil suit. Amending CERCLA

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[189] *See, e.g.*, Zondorak, *supra* note 185, at 469 (finding that increased liability under CERCLA led to "corporations' increased use of environmental audits and risk assessments to help manage environmental liabilities").

[190] *See* Campbell, *supra* note 152, at 222. "One result of the Court's decision is the near elimination of any incentive for businesses to clean up their property voluntarily. Likewise, businesses will learn from Aviall's experience not to report suspected or discovered contamination to state or federal agencies." *Id.* (citations omitted).

[191] *Cooper v. Aviall*, 543 U.S. at 167.

[192] *See* Smith & Nastich, *supra* note 146, at 21. Until CERCLA is amended, PRPs should use the Court's decision in *Cooper v. Aviall* when developing site strategies. *Id.*

[193] *See* 42 U.S.C. § 9613 (2000).

§ 113(f) to allow PRPs who voluntarily incur cleanup costs to obtain contribution provides an effective remedy to the problems created by *Cooper v. Aviall.*

### B. *The Need for ADR Under CERCLA*

In determining whether to amend CERCLA, Congress should take into account a recent joint memorandum from the CEQ and the OMB.[194] The memorandum establishes the Executive Branch's view on the need for ADR in resolving environmental conflicts.[195] The memorandum points out many of the challenges that the government faces without the ability to effectively use ADR in resolving issues.[196] These challenges include, but are not limited to: "Protracted and costly environmental litigation;" "Unnecessarily lengthy project and resource planning processes;" "Costly delays in implementing needed environmental protection measures;" "Forgone public and private investments when decisions are not timely or are appealed;" "Lower quality outcomes and lost opportunities when environmental plans and decisions are not informed by all available information and perspectives;" and "Deep-seated antagonism and hostility repeatedly reinforced between stakeholders by unattended conflicts."[197] As a result of the Supreme Court's decision in *Cooper v. Aviall*, many of these challenges will remain at the forefront of resolving environmental conflicts. Therefore, Congress needs to amend CERCLA in order to resolve the difference in the view of the Executive Branch versus the Court's method of interpreting the contribution provisions under CERCLA.

## VI. CONCLUSION

The use of ADR and negotiated settlements by the EPA is essential for resolving conflicts involving the CERCLA.[198] However, the Supreme Court's decision in *Cooper v. Aviall*, in addition to discouraging voluntary

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[194] *See* MEMORANDUM ON ENVIRONMENTAL CONFLICT RESOLUTION, *supra* note 5. "The President strongly supports constructive and timely approaches to resolving conflicts when they arise over the use, conservation, and restoration of the environment, natural resources, and public lands." *Id.*

[195] *Id.*

[196] *Id.*

[197] *Id.*

[198] *See* Niermann, *supra* note 4, at 389.

cleanups, [199] undermines the EPA policy of promoting the use of ADR and reaching negotiated settlements between PRPs and the EPA or other PRPs. The outcome encourages PRPs to wait for litigation instead of voluntarily incurring cleanup costs or negotiating settlements with administrative agencies.[200] In order to remedy the problems arising from the decision in *Cooper v. Aviall*, Congress should amend CERCLA § 113(f) to include a contribution right for PRPs that voluntarily incur cleanup and response costs while negotiating with the EPA or a state administrative agency.

[199] *See* Gershonowitz, *supra* note 120.

[200] *See* Millan, *supra* note 2, at 214.